AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 94-388 **December 5, 1994**
Relationships Among Law Firms

Lawyers have an obligation not to mislead prospective clients as to what the lawyer is able to bring to bear on the client's matter in terms of the size of the firm, the resources available to the firm or the relationship between the firm and other law firms with which it is associated. Words like "affiliated," "associated," "correspondent," or "network," without further explanation, can be misleading and, therefore, use of these terms, without a meaningful description of the nature of the relationship, violates Model Rule 7.1.

In certain instances, because of the nature of the relationship between law firms and without regard to whether the relationship has been disclosed, it may be necessary for a lawyer to decline a proffered representation because the representation would be materially limited by such a relationship; in addition, if the lawyer believes the representation will not be adversely affected, it may be necessary for the lawyer to disclose the relationship to prospective clients so that the clients can determine whether, despite the relationship, they wish to consent to the representation.

If a law firm licenses its name to other firms, all firms so licensed must, in fact, operate as a single firm and be treated as part of a single firm for all purposes under the Model Rules. Law firm relationships that result in the sharing of fees must comply with the requirements of reasonableness of the fee, disclosure to the client of the sharing arrangement, and division of the fees in accordance with services performed or assumption of responsibility. Lawyers must also avoid running afoul of Model Rule 7.2(c)'s prohibition on giving something of value for referrals.

The growth, development and diversity of the legal profession have spawned a proliferation of new ways of conducting the practice which have taken lawyers far beyond the sole practitioner and single office law firm models of an earlier era. Today law firms operate in multiple cities, form networks of law firms under a common firm name or trade name, and join forces and pool resources in any number of business arrangements. The Committee has received a number of inquiries relating to the ethical propriety of these rela-

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tionships and the ethical requirements associated with them.

This opinion is intended to suggest some guidelines with respect to two fundamental ethical precepts which must be addressed in this context. The first is the obligation not to misstate what a law firm has to offer. The second is the obligation to assure that a client of one firm is aware of the relationship between that firm and any other firms with which it is involved insofar as the relationship may give rise to conflicts of interest, the sharing of fees, or certain other interactions that implicate the Model Rules of Professional Conduct. This opinion presumes that the actual formation of relationships between law firms will have occurred only where the law firms were able to comply with their obligations to existing clients with respect to all such matters.

I. Full Disclosure

A client should not be misled about the firm resources available to assist in the provision of services the client requires. For example, if the lawyer has given the client reason to believe that the firm has offices in multiple cities, that should in fact be the case. Similarly, if the lawyer has given the client reason to believe that in going to firm "A" the client will have available to work on its matter the resources of an affiliated firm "B," then firm "A" must, in fact, have access to the talent, expertise and experience of attorneys at firm "B".

This obligation not to mislead clients, potential clients or the general public, whether about the basic law firm associations or otherwise, derives from Model Rule 7.1, which prohibits communications by a lawyer regarding legal services that are false or misleading.[1] In addition, Model Rule 7.5(a) prohibits the use of a "firm name, letterhead or other professional designation that violates Rule 7.1,"[2] and Model Rule 7.5(d) provides that "lawyers may state or imply that they practice in a partnership or other organization only when that is the fact."[3]

The problem confronting the Committee is that a vast array of different words and phrases have been used to describe the relationships among law firms: "strategic alliance," "network," "affiliation," "association," "correspondent" are but a few that have come to the Committee's attention. Moreover, despite the Committee's attempt in Formal Opinion 84-351 to define what is

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1. Rule 7.1 states in pertinent part, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." The Comment to Rule 7.1 states, in part, that "This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2." See also DR 2-101(A), which provided that "[a] lawyer shall not ... use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laundry or unfair statement or claim."

2. Similarly, DR 2-102(B) provides that "[a] lawyer in private practice shall not practice under ... a name that is misleading as to the identity of the lawyer or lawyers practicing under such name...."

3. D.R. 2-102(C) is substantially identical to Rule 7.5(d).

meant when two firms say that they are "associated" or "affiliated," various words, including those two, are being used to describe relationships ranging from something very close to an actual partnership to one involving occasional referrals.

This state of affairs has led the Committee to conclude that its efforts in Formal Opinion 84-351 to bring some order and meaning to the use of several common terms describing relationships between firms have not been successful. Any similar attempt simply to define what relationships are meant by such terms as "network," "alliance" or "correspondent" is likely to be similarly unavailing. It is critical, no matter what words are used to describe the relationship between firms, for clients to receive information that will tell them the exact nature of the relationship and the extent to which resources of another firm will be available in connection with the client's retention of the firm that is claiming the relationship.

The Committee concludes that the use of one or two word shorthand expressions is not sufficient to fulfill that requirement. Because the words mentioned above and others have been employed to describe so many different relationships, and because the modern era has generated so many imaginative ways in which firms relate to one another (and with which they describe them), the Committee believes that the mandate of Model Rule 7.1 not to mislead or deceive can only be met if a full description of any relationships the firm may have used in marketing its services is provided to all prospective clients as to whom the lawyer reasonably believes the relationships may be relevant, and to all present clients to whom the lawyer reasonably believes the relationships may be relevant if at any time any of those relationships changes. Thus, for example, a firm that represents that it has a "special affiliation" with a Washington, D.C. firm that specializes in tax matters would probably conclude that complete disclosure of that relationship was required for most, if not all, of its tax and business clients, but not necessarily required for the firm's litigation clients, if the affiliation would be irrelevant for them.

This conclusion contemplates that if the clients or prospects for whom the relationship is relevant are told the firm is a member of a "network," in an "association" or is a "correspondent" of another firm, they will be given the following information:

a. whether any professional personnel from the other law firm(s) may be involved in providing the professional services.

b. whether any part of the fee the client pays will be shared with any of the other firm(s).

c. whether profits of the firm the client originally retained will be shared with the other firm(s).

d. whether the law firms in the relationship conduct common training programs and/or share strategies and/or expertise.

e. whether the firms in the relationship conduct any other common

operations, or, by contrast, the relationship is simply a common marketing device.

The goal here would be to provide the client with sufficient meaningful information to avoid misleading the client about the nature of the relationship. Similar information would have to be provided for each of the other descriptive words mentioned in this opinion as well as the many other shorthand words and phrases that are used to describe interfirm relationships.

In so concluding, the Committee does not mean to suggest that on letterhead and law lists like Martindale Hubbell the firm cannot simply state that it is "affiliated" with another or that it is a member of a particular "network." The full disclosure addressed here rather must be given to any prospective client to whom the lawyer reasonably believes the relationship may be relevant, preferably in writing, before the lawyer embarks on the work required by the engagement. Most firms will no doubt find it simplest to prepare an addendum to their standard retention letter that would include a description of the relevant relationship for this purpose.

II. Disclosure for Conflict of Interest Purposes

The dimensions of the second ethical precept implicated by law firm relationships are somewhat different. Rather than an issue of truth in representations regarding available resources, this issue concerns the need for full disclosure of potential conflicts of interest stemming from inter-firm relationships and, where appropriate, client waiver of objection to those conflicts. This obligation to address conflicts of interest, unlike the obligation outlined in Part I of this Opinion, exists without regard to whether the firm has disclosed that such a relationship exists.

Just as clients are entitled to know that their law firm does work on a regular basis for the firm representing their adversary, so, too, may they be entitled to know that their law firm and their adversary's law firm have other types of relationships. This disclosure obligation derives from Model Rule 1.7(b), which states, in pertinent part:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation.

The extent of the obligation to make disclosure in accordance with Rule 1.7 is peculiarly fact-dependent.

No opinion can begin to identify all the possible situations where the obligation to disclose may arise. Similarly, for the reasons described above, no hard and fast rules can account for all situations in which a particular word or words are used to describe the relationship. Whether conflicts have to be cleared between law firms and whether relationships have to be disclosed to prospective clients of either turns on the substance of the relationship, not the

name the law firms choose to call it. But if a particular representation may be materially limited by an existing relationship, the lawyer must decline the representation unless the lawyer believes the representation will not be adversely affected and the client consents after consultation. [4]

It may be instructive to evaluate several examples along the continuum from that which clearly would not materially limit a representation (no relationship) to that which clearly does (full partnership). Near one end of the spectrum are situations where firms from time to time informally refer matters to one another where practicable. Even in cases where such relationships have resulted in multiple referrals there is no reason that the relationship would, as a general proposition, materially limit the representation. These casual referrals, or even periodic mutual backscratching, should not constitute the kind of interest that would trigger the determination required by Model Rule 1.7(b).

A more difficult question arises when both firms belong to a "network" (or otherwise characterized group) of firms which in fact share no clients, no confidences, no fees and no professional engagements but which do agree more or less formally to advertise their relationship and refer matters to each other on an ad hoc basis. Given the limited nature of such a relationship, it is the view of the Committee that this sort of limited network relationship without more, also would not call into play Model Rule 1.7(b). A more regular practice of referral may, however, give rise to a need to clear conflicts if the relationship involves sharing of client fees.

A different series of questions is presented if there is a non-law related business relationship between law firms. For example, if one firm lends another significant working capital, or if two firms jointly buy a building they both will use, or if two firms enter into a joint venture to establish, for example, a title company, the resulting business relationship may give rise to a need to address the conflict question. In some instances the business relationship between the two firms will be so marginal or unimportant that Model Rule 1.7(b) will not come into play. On the other hand, there may be situations in which one firm's business connection with another will be so integral to its enterprise that it could materially limit its ability to oppose the other firm's clients. In this case, the firm's clients ought to have an opportunity to decide whether they wish to continue to be represented by a firm whose business partner is representing an adverse party against the client. At some point the lawyer's interest in the relationship with the other firm will be of suffi-

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4. The term "consultation," used in Rule 1.7(b)(2), is defined in the Model Rules terminology to denote "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." It is important in this context to recall that the Comment to Rule 1.7(b)(1) states that "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."

cient moment that, even if the lawyer believes the representation will not be adversely affected, the lawyer must disclose the relationship to her client to enable the client to decide whether to agree to the representation.

Difficult questions are also raised when the professional relationship between the firms becomes more substantial than the network arrangement described above. As the two firms become more inextricably linked, the need to consider the conflict potential becomes more pronounced. As a general proposition the Committee concludes that where two law firms have a relationship in which they share profits, it is highly unlikely that one could represent a client whose interests are adverse to clients of the other firm without following the procedure prescribed by Model Rule 1.7(b). In such a case the lawyer must make a good faith determination that the representation will not be adversely affected and, if that determination can be made, secure the informed consent of the client if the representation is to go forward.

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There is one other question in the conflict area raised by relationships between law firms. At some point the client of law firm A is entitled to know whether law firm B, with whom law firm A has a relationship, represents interests adverse to the client of law firm A. This is certainly so if a client, in going to law firm A, will have law firm B working on its matter. In this situation the client is the client of both firms, and is entitled to the full protections of Model Rule 1.7 as to both firms. A client is also entitled to know of conflicting commitments where, as described in Formal Opinion 84- 351, the relationship between the two firms is "close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business." In that relationship one firm was "available to the other firm and its clients for consultation and advice." Quite apart from the name that is applied to that relationship, the Opinion correctly concluded that lawyers of the "affiliated" or "associated" firm will not simultaneously represent persons whose interests conflict with the client's interests, just as would be true of lawyers who occupy an 'Of Counsel' relationship with the firm.

The same expectation necessarily exists when two firms are "Of Counsel" to each other. Formal Opinion 90-357; Informal Opinion 1315 (1975). In each case, of course, if the lawyer believes the representation will not be adversely affected, the client can be asked to consent to the representation.

But even in situations short of a "close and regular, continuing and semi-permanent relationship," if the relationship of the two firms is sufficiently close, the client of firm A may be entitled to know whether firm B represents interests adverse to the client. Of course, the client of firm A, having been informed of firm A's "strategic alliance" with firm B and what that alliance means, may not wish to have the fact and nature of its representation by firm A circulated among the lawyers at firm B. Given these competing interests, in the view of the Committee it is enough if firm A informs its client of the nature of its relationship with firm B and permits the client to decide whether conflict clearance at firm B should occur.

III. Licensing of a Firm Name

The next question the Committee has been asked to address involves a law firm with a practice concentrated in a particular area which seeks to create a national network of firms, all of which will use the original firm's name under a licensing agreement by which the original firm will provide all marketing for the firms in the network. The Committee believes that, in contrast to the situation in which several firms are associated but retain their own identities, the use of the same name by all the firms in a network will effectively represent that they are all offices of one and the same firm. Such a representation is, quite clearly, a misrepresentation under both Rule 7.1 and Rule 7.5(a) if in fact all the firms bearing the same name are not part of the same firm. [5] If several entities are, or are held out as, a single firm, then their lawyers must meet not only the obligations regarding preservation of confidences and avoidance of conflicts, but also those arising under Rules that normally come into play only when lawyers are associated in the same firm.

Principal among such provisions are Rules 5.1(a) and (c), which deal with one lawyer's responsibility for the conduct of other lawyers.[6] These provisions provide:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Also pertinent are Rules 5.3(a) and (c), which involve a lawyer's responsibility for the actions of persons acting under his supervision and direction and provide:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; and

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(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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5. This opinion does not address the legal significance of identity as a single firm in terms of contract, tort, corporate or other law.

6. There are no direct counterparts to these provisions in the Model Code.

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[7]

If all of the lawyers in the participating firms in a "network" of licensed firms using the same name meet all of the ethical requirements that would be applicable to them if they were all lawyers in a single firm, then, at least from the ethical point of view, there would be no impropriety in such an arrangement. Absent such compliance, there would, at a minimum, be a violation of Rule 7.1 and Rule 7.5(a).

IV. Financial Arrangements Between Related Firms

The final issue that the Committee has been asked to address concerns fee sharing and other financial arrangements between related firms, however the relationship is denominated. A fundamental proposition, of course, is that all of the firms in the relationship must comply with ethical requirements regarding the sharing of fees. This is so even where, as described above, the firms must be treated for conflicts purposes as if they are a single firm.

Under Model Rule 1.5(e)(1), fees may be shared only if they are divided in proportion to services performed or if, pursuant to written agreement by the client, each lawyer assumes joint responsibility for the representation.[8] The Model Code differs in that it requires that fees be divided in proportion to the services performed and the responsibility assumed by each. See DR 2- 107(A). A client whose fee is shared must receive a complete explanation of the sharing arrangement, and the arrangement cannot be implemented under the Rules if the client objects. See Model Rule 1.5(e); Model Code DR 2- 107(A) (stating that the client must consent "to employment of the other lawyer"); see also Formal Opinion 84-351 at n. 8. Moreover, the total fee must be reasonable. See Model Rule 1.5(e)(3); Model Code DR 2-106, EC 2-17.

Another ethical question raised in this context is whether one firm may finance another (e.g., by making loans) in a manner that is tied to referral business generated by the financed firm. In general, one firm may finance another and may receive referrals from the financed firm. Since, however, under Model Rule 7.2(c) a lawyer "shall not give anything of value to a person for recommending the lawyer's services," a firm that finances another

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7. There are no direct counterparts to these provisions in the Model Code.

Also of possible pertinence are Rule 5.4(a), prohibiting a "lawyer or law firm" from sharing legal fees with a nonlawyer, with certain exceptions, and Rule 5.4(b), which provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."

8. The Committee does not address in this Opinion whether sharing of profits among lawyers is subject to the same requirements as the sharing of fees.

firm cannot either receive referrals of business as a purported return on its investment or make the referrals as a quid pro quo for a return on its investment. Indeed, in general firms may not contract to refer business to one another: the exchange of binding promises would in itself constitute "giving something of value" for referrals in violation of Rule 7.2(c). [FN9] This principle holds even if the firms are "associated," "affiliated" or part of a "network." However, as long as there is no fixed relationship between the referrals amounting to a quid pro quo, firms may agree to consider each other for appropriate referrals.

Arrangements whereby financing from one firm is tied to referral business from another may also violate the ethical constraints on sharing fees with lawyers not in the same firm. In Informal Opinion 85-1514 (1985), the Committee explained that a professional corporation of tax law specialists could not ethically use preferred stock dividends or a limited partner distribution to pay an outside lawyer in an amount proportional to the corporation's earnings from clients referred to it by the outside lawyer. This arrangement would amount to a division of fees among lawyers not in the same firm, and therefore would have to comply with the requirements of Rule 1.5(e) outlined in part above. Other financial arrangements that tie a sum of money to the level of earnings from referrals are similarly impermissible. For example, one firm may not finance another firm in an amount proportional to earnings from referrals from the financed firm. Nor may a firm receive a return on an investment in another firm pegged to earnings that the financed firm derives from referrals from the financing firm.

Finally, where one firm is providing financing to another firm, but the two firms are then asked to represent opposing parties in a matter, Rule 1.7(b) applies, as discussed in Part II above.

Conclusion

In conclusion, the Committee observes that neither the Model Rules nor the Model Code speaks directly to the ethical problems raised by relationships between law firms. Although such relationships may raise special concerns, particularly in the area of conflicts of interest, any relationship between firms

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9. Cf., e.g., In re Weinroth, 495 A.2d 417, 420-21 (N.J.1985) (an arrangement whereby a law firm provided a referral client a credit for future legal expenses and the client gave the referrer a fee constituted a violation of ethical rules because the law firm indirectly gave "value" for a referral); Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. OP. 92-19 (Oct. 16, 1992) (one lawyer may not purchase client files and client lists from another attorney because, among other reasons, "any money paid by a purchaser for client files and lists would be in essence a reward to the seller for recommending the purchasing lawyer" under Ohio DR 2-130(B); Illinois State Bar Ass'n, Op. No. 92016 (Jan. 22, 1993) (a lawyer who practiced before the IRS could not ethically offer reduced rates to family members of an IRS agent in exchange for that agent's "doing what he could to further the career" of the lawyer because, among other reasons, the reduction in fees is something 'of value' " under Illinois Rule 7.2).

is permissible as long as the attendant ethical obligations are met. These include the obligation to assure that any representations that have been made regarding the relationship are clear and not misleading, and the obligations to avoid conflicts and preserve confidences as may be entailed by the actual circumstances of the relationship. Related firms should also see to it their fee and referral arrangements do not conflict with applicable ethical rules.